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April 9, 2009

Jeff S. Jordan, Esq.
Office of the General Counsel
Federal Election Commission
999 E. Street, NW
Washington, DC 20463

Re: MUR 6169

Dear Mr. Jordan:

The undersigned represents the Triangle Pride PAC ("TPP"). By this letter, the committee responds to a complaint filed by Jeff Timmer, Executive Director of the Republican Party of Michigan. In his complaint, Mr. Timmer alleges that TPP "[o]n or about February 20, 2008 . . . made a \$100 contribution to Peters for Congress;" "[o]n or about April 17, 2008 . . . made a \$500 contribution to Schauer for Congress;" and "[o]n or about May 13, 2008 . . . made a \$150 contribution to Friends of Senator Carl Levin. Mr. Timmer also alleges that by making these contributions TPP "triggered 'political committee' status pursuant to the Federal Election Campaign Act." Finally, Mr. Timmer alleges that after triggering political committee status TPP "had ten (10) days . . . to file with the Federal Election Commission . . . and register as a political committee."

TPP does not dispute the underlying facts in this matter. However, TPP is not required to register as a political because TPP does not have a major purpose of influencing federal elections.

Legal Analysis

TPP is a committee that is organized under the laws of the state of Michigan on behalf of its sponsoring organization, Triangle Action Fund, a membership corporation organized under section 501(c)(4) of the Internal Revenue Code. TPP is subject to the prohibitions, limitations and reporting requirements of Michigan law. Other than the small amount contributed to federal candidates, TPP operates to influence the election or defeat of non-federal candidates and ballot propositions in the state of Michigan.

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1. Under the FEC rules, a political committee must trigger both a registration threshold and have a "major purpose" of influencing a federal election

TPP is a political committee that has been organized under the laws of the state of Michigan on behalf of its sponsoring organization, Triangle Action Fund, a membership association organized under section 501(c)(4) of the Internal Revenue Code. Other than the small amount contributed to federal candidates, TPP operates to influence the election or defeat of non-federal candidates and ballot propositions in the state of Michigan.

The complaint purports to rely on Advisory Opinions 2003-29 and 1982-46, which both state that under 2 U.S.C. 431(4)(B) a separate segregated fund is a political committee regardless of the size of its contributions to Federal candidates or committees. However, the Commission should not solely rely on either opinion since neither Advisory Opinion applied nor discussed the constitutionally mandated major purpose test.

The Commission has explained:

The Supreme Court has held that, to avoid the regulation of activity "encompassing both issue discussion and advocacy of a political result" only organizations whose major purpose is Federal campaign activity can be considered political committees under the Act. *See, e.g., Buckley*, 424 U.S. at 79; *MCFL*, 479 U.S. at 262. Thus, the major purpose test serves as an additional hurdle to establishing political committee status. Not only must the organization have raised or spent \$1,000 in contributions or expenditures, but it must additionally have the major purpose of engaging in Federal campaign activity.

Political Committee Status, 72 Fed. Reg. 5595, 5601 (February 7, 2007). ¹

Thus, in recent enforcement matters, the Commission has consistently applied the major purpose test to determine whether an organization has met political committee status. *See e.g.* MURs 6106 (Minnesota Corn Growers Association PAC); 5542 (Texans for Truth); 5541 (The November Fund).

¹ Furthermore, it should be noted that a first-dollar registration requirement that forces every state registered separate segregated fund who gives but one dollar to a Federal committee to register as a political committee, ignores the *di minimis* effect of small contributions and runs the risk of being unconstitutionally overbroad. *See e.g. Swaffer v. Cane*, 08-CV-208, 2009 WL 728450, *5 (E.D. Wis. March 16, 2009) (holding that a state statute which requires individuals promoting or opposing a referendum to register with the state after spending \$26 is an unconstitutional hindrance on the individual); *Canyon Ferry Rd. Baptist Church of East Helena, Inc. v. Unsworth*, 06-35883, 2009 WL 455522 (9th Cir. February 25, 2009) (holding that a state statute which requires disclosure of *di minimis* contributions creates issues of unconstitutional vagueness); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 33-36 (1st Cir. 1993) (holding that a statute which required different first dollar disclosure requirements for individual candidates and PACs unconstitutional).

2. TPP's "major purpose" is not Federal campaign activity

As explained above, the Petitioner cannot solely rely upon either AOs 2003-29 and 1982-46 because neither of the AOs applied the major purpose test to the facts of the opinion request. The Court, in *Buckley* determined that only organizations whose major purpose is campaign activity are political committees under the Act. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), See also *Federal Election Com'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986). Furthermore, the major purpose test has recently been restricted to include only Federal campaign activities. *See* MUR 5365 (Club for Growth), Factual and Legal Analysis at 21, *Federal Election Com'n v. GOPAC*, 917 F. Supp 851, 861-62 (D.D.C. 1996), *Federal Election Com'n v. Malenick*, 310 F.Supp.2d 230, 234-36 (D.D.C. 2004), 72 Fed. Reg. 5595 at 5601.

Thus, the major purpose test acts as a judicial constraint to exclude some organizations that may otherwise trigger status as a federal political committee from the burden of registering as a political committee if their major purpose is not Federal campaign activity. 72 Fed. Reg. 5595 at 5601; *GOPAC*, 917 F.Supp at 861-62. As a result, even though TPP gave \$750 contributions to federal candidates it is not a political committee because its "major purpose" is not Federal campaign activity.

An organization's can establish its "major purpose" by a series of public statements of purpose. *Malenick*, 310 F.Supp.2d at 234-36. In *Malenick*, the court determined that an organization demonstrated its major purpose through its own materials, which stated that the organization's goal was to support the election of Republicans to federal office. *Id.* In the instant case, TPP's website suggests that its "major purpose" is to "use electoral politics to overcome homophobia and transphobia." TPP's website states that they will do this by supporting civil rights, working to end discrimination based on sexual orientation and gender identity, and by endorsing and contributing to candidates for public office.

News articles relating to TPP demonstrate that the majority of their endorsements focus on state and local candidates. For example, in 2008, TPP made 65 candidate endorsements, 63 of which were for state and local candidates. Federal candidates accounted for just 3% of TPP's endorsements. The bulk of TPP's public statements and activities focus on promoting civil rights and supporting state and local candidates. As a result, TPP is not a political committee because their "major purpose" does not constitute Federal campaign activity. *See Koerber v. Federal Election Com'n*, 583 F.Supp.2d 740, 748 n. 5 (E.D.N.C. 2008) (citing 72 Fed. Reg. 5595 at 5601 (directing the Commission to look at an organization's Federal campaign activity in relation to their overall activity)).

An organization may also satisfy the major purpose test by independent spending that is "so extensive that the group's major purpose may be regarded as campaign activity." *MCFL*, 479 U.S. 238 at 262. While neither the Court nor the Commission have defined "so extensive," the Commission should look at the organization's spending on Federal campaign activity in proportion to its spending on overall activity. Fed. Reg. 5595 at 5601. *See Koerber*, 583 F.Supp.2d at 748; AO 1996-03 (comparing an organization spending on campaign activity to their overall spending). *See* MUR 5365 (Club for

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Growth), Factual and Legal Analysis at 21, *GOPAC*, 917 F.Supp at 854-55 (confining the "major purpose" test to Federal campaign activity).

In AO 1996-03, the Commission evaluated the percentage of an organization's state and federal contributions compared to its overall expenditures. The Commission stated that the organization's state and federal contributions accounted for just 4% to 10% of their over all expenditures during a six-year period and thus, their major purpose was not campaign activity. See AO 1996-03. As explained above, since the 1996 Commission Advisory Opinion regarding the major purpose test, the major purpose test has been limited to Federal campaign activity. See MUR 5365 (*Club for Growth*), Factual and Legal Analysis at 21, *GOPAC*, 917 F.Supp at 854-55; 72 Fed. Reg. 5595 at 5601. Here, TPP spent a total of \$11,641.95 in 2008. Of that total, TPP spent \$750 or 6.4% on contributions to three Federal candidates, well within the percentages discussed in the 1996 AO. TPP's spending on federal candidates is not of a degree necessary to constitute their "major purpose"

Based on the *di minimis* effect of TPP's Federal contributions and the fact that TPP's "major purpose" is not Federal campaign activity the Commission must determine that TPP has not met the qualification as a "political committee" under the Federal Election Campaign Act.

Even, assuming *arguendo*, if the Commission finds that TPP is a political committee, it should use its prosecutorial discretion and dismiss the complaint based upon the small amount of funds spent in connection with federal elections in this matter. However, if the Commission decides to proceed in this matter, it should refer this matter to its Alternative Dispute Resolution Division for disposition.

Sincerely,



Neil Reiff
Counsel for Respondents